listed in the motion." In *Crawford v. State*, 834 S.W.2d 749, 752 (Mo. banc 1992), we concluded that "verified" as used in Rule 29.15 means that a declaration must be made in a manner that is supported by a movant's oath or affirmation. "A movant does that by subscribing to the required declaration while in the presence of someone authorized by Missouri law to administer oaths and affirmations." *Id.* For inmates such as defendant White, post-conviction motions are generally verified by a notary located in the correctional facility. In our experience, defendants who are incarcerated frequently complain that they have difficulty arranging for a notary public to verify their post-conviction motions so that they can be timely filed. We pass no judgment of the validity of this excuse. But death penalty cases, often involving heinous crimes, have become clouded by arguments regarding verification and the filing of paper work. Missouri courts need to see through this blizzard of paper and technicalities that fog the underlying issues so that they can reach a just and timely result, especially in death penalty cases. The public is frustrated with the drawn-out nature of death penalty cases and, therefore, we need to refine the post-conviction motion requirements to expedite the proceedings.

Although we wish to avoid any unnecessary technicalities that hinder a movant's ability to file timely a pro se 29.15 motion, we remain stringent about the time requirements for post-conviction motions. To alleviate one technicality, however, we hold that henceforth, for purposes of filing a pro se 29.15 motion, the defendant's signature will be sufficient verification "that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not listed in the motion." Rule 29.15(d). We will still strictly adhere to the requirement that all grounds not raised in the pro se motion are waived, with the exception of those filed in a timely amended 29.15 motion.

Although we are relaxing the verification requirement for defendants' pro se 29.15 motions, we will continue to require amended motions filed pursuant to Rule 29.15(e) to be properly verified. This is in part because "[a]n amended motion differs significantly from the original motion." *Bullard v State.* 853 S.W.2d 921, 922 (Mo. banc 1993). The original pro se motion is relatively informal "and need only give notice to the trial court, the appellate court, and the State that movant intends to pursue relief under Rule 29.15." *Id.* On the other hand, "an amended motion is a final pleading, which requires legal expertise. Counsel must be appointed to represent indigent movants in order to ensure its proper drafting." *Id., citing* Rule 29.15(e). Since the amended motion is drafted by appointed counsel, it is necessary to have the amended motion verified in order to ensure that movant believes it is accurate and constitutes all grounds for relief known to movant. Additionally, this helps to ensure that movant is adequately represented. We will, therefore, continue to require the verification of amended 29.15(e) motions.

In its order dated August 28, 1992, the motion court dismissed all of White's 29.15 motions because they were not properly verified. However, the court stated that in the alternative, it overruled defendant's 29.15 motion on the merits for all the reasons stated in the findings of fact and conclusions of law dated August 1, 1990. In those findings of fact and conclusions of law, the motion court failed to rule on all the defendant's claims set forth in his pro se 29.15 motion. Because defendant's amended 29.15 motion specifically stated that it was "intended to supplement and not supersede movant's pro se motion," the motion court should have made findings on all the issues raised in defendant's pro se 29.15 motion. Therefore, we remand back to the motion court for findings of fact and conclusions of law on defendant's pro se 29.15 motion. On remand, the motion court shall conform to all of this Court's holdings in *Barry v. State,* 850 S.W.2d 348 (Mo. banc. 1993).

FIRST AND SECOND AMENDED 29.15 MOTIONS

The next issue is whether the trial court had jurisdiction to rule on defendant's first and second amended motions. Defendant's amended motion must be properly verified and filed in a timely fashion in order to comply with Rule 29.15(f), which states:

> Any amended motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed or the entry of appearance by counsel that is not appointed. The court may extend the time for filing the amended motion for *one additional period not to exceed thirty days.*

Id. (Emphasis added.) Unless both the time and verification requirements are met, the motion court has no jurisdiction to rule on the defendant's 29.15 motion.

First, we will address the verification requirement and the effect that defendant White having signed it in blank had on the motion court's jurisdiction. The purpose of requiring verification of defendant's amended motion is to ensure the accuracy and completeness of the 29.15 motion drafted by defendant's counsel. It also discourages frivolous and unfounded allegations. *Malone v. State,* 798 S.W.2d 149, 151 (Mo. banc 1990). In this case, defendant attached a handwritten verification, which he had signed on November 14, 1989, to both his first and second amended motions. This verification, which was signed in blank, predated the existence of both amended motions. Defendant White stated that he signed the verification in blank during his initial meeting with his appointed counsel "so that it [the verification] would be available when the amended motion was ready." By signing the verification in blank, defendant knew or should have known

that he was an active participant in falsely verifying a document that had not yet been written. We, therefore, will not allow him to later argue that the document that he falsely verified is incomplete or does not raise all grounds known for relief. When white signed the verification in blank, he waived all his rights to complain about its content.

The fact that defendant White signed the verification in blank also has no effect on the motion court's jurisdiction. We will not allow a defendant who actively participates in falsifying the verification to argue lack of jurisdiction because of that improper verification. Once White signed the verification and it was notarized by his attorney, he waived all right to assert that the verification requirement of Rule 29.15 was not met for the purpose of establishing the motion court's jurisdiction.

The second requirement that must be met to invoke the court's jurisdiction is that the motion be timely filed. Rule 29.15 clearly states that defendant has thirty days to file his amended motion and that the court may extend the period for filing "for one additional period not to exceed thirty days." *Id.* In other words, the defendant is allowed a maximum limit of sixty days to file his amended motion from the day his counsel is appointed. "This Court has held that the effective date of appointment of counsel is the date on which the office of public defender is designated rather than the date of counsel's entry of appearance." *White,* 813 S.W.2d at 864, *citing Schneider v. State,* 787 S.W.2d 718, 720 (Mo. banc), *cert. denied.* 498 U.S. 882 (1990).

Here, the public defender's office was appointed on September 25, 1989. Defendant's first attorney was given until October 23, 1989, to file his amended motion. Defendant's first attorney then requested a thirty day extension, and he was granted until November 23, 1989, to file his amended motion.

On November 9, defendant's first attorney withdrew and his second appointed attorney entered an appearance. After entering his appearance, however, defendant's second appointed counsel failed to file an amended motion timely. The extension "for one additional period not to exceed thirty days" expired on November 23, 1989. Rule 29.15(f). Defendant's second attorney did not file his first amended motion until November 27, 1989, which was four days after the deadline. On that same day, defendant's second counsel also requested and later received an additional sixty days to file a second amended motion. But by this time he had already been granted his one authorized extension and had exceeded this extension as well as the overall sixty day time requirement of Rule 29.15. By granting the request for a second extension of time, the motion court exceeded its jurisdiction because Rule 29.15 clearly states that the court may grant only one extension not to exceed thirty days. Thus, the court had no jurisdiction to rule on defendant's first or second amended motions because they were all filed out of time. The motion court, therefore, should have dismissed the amended motions as untimely and proceeded on the issue of abandonment pursuant to *Sanders* if there was a request to do so after the dismissal.

ABANDONMENT

Once we have decided that the motion court had no jurisdiction to rule on the defendant's untimely amended motions, it becomes necessary to determine whether the defendant was abandoned by counsel. Because the motion court has already conducted a detailed *Sanders* hearing on this issue, we will examine the record and make a determination on the issue of abandonment.

The defendant argues that the motion court's finding at the *Sanders* hearing that White was not abandoned by post-conviction counsel was clearly erroneous because it was not

supported by the record. The basis of the motion court's decision was that it never had jurisdiction over defendant's pro se 29.15 motion because it was not properly verified. The court reasoned that it was impossible to abandon a cause that did not exist. As discussed earlier, we have already concluded that defendant's pro se motion properly invoked the jurisdiction of the motion court.

However, the motion court also reinstated its findings of fact and conclusions of law dated April 15, 1992. In those earlier findings, the motion court also concluded that there was no abandonment as a result of counsel's withdrawal, failure to file a timely amended motion, failure to verify, or failure to allege sufficient facts and grounds for relief. The court reasoned that: "A withdrawal with or without leave of court would be an abandonment if a new attorney was left too little time to accomplish his goals." The court then stated that since defendant's second attorney was given sixty days in which to file his amended motion, there was ample time to achieve the requirements of Rule 29.15(e). We have concluded, however, that the amended motions filed by defendant's second attorney were not timely. Thus, the motion court's determination that defendant's second appointed counsel had sixty days in which to file his amended motion is incorrect. Defendant's first and only extension authorized under Rule 29.15 extended the filing date to November 23, 1989. Defendant's first attorney withdrew on November 9, 1989. His second appointed attorney entered his appearance on that same day. That left defendant's second appointed attorney from November 9 to November 23 to file the amended motion. That left him fourteen days (excluding November 9), as opposed to sixty days as suggested by the motion court, to meet with the defendant, research all the possible grounds for relief, and draft the amended motion. This leaves serious question as to whether defendant was abandoned by his first attorney's withdrawal without permission from the motion court and his second attorney's failure to file an

amended motion timely.

In *Sanders v. State*, 807 S.W.2d 493, we were faced with the question of whether defendant's counsel's failure to file an amended 29.15 motion timely amounted to abandonment. On remand, we instructed the trial court that "[t]he burden shall be on the movant to demonstrate that the untimeliness is not the result of negligence or intentional conduct of the movant, but is due to counsel's failure to comply with Rule 29.15(f). If the court determines that the untimeliness resulted from negligence or intentional conduct of movant, the court shall not permit the filing" of an untimely 29.15 amended motion. *Id.* at 495. But if the untimeliness resulted exclusively from counsel's action or inaction, the court should consider movant's amended motion as if it was timely filed. *Id.*

We conclude that the untimely filing of defendant's amended motion was not the result of negligence or intentional conduct by White. Rather, the untimely filing resulted exclusively from the inaction of defendant's appointed counsel. The motion court made a similar finding, although it based its holding on other grounds, when it concluded "that no action or inaction by movant had any effect on]defendant's second counsel's] timing of the filing of the motion." In his affidavit, defendant White stated that: (1) he gave his second appointed counsel "all the information [he] had available to [him] to assist in the preparation of an amended motion," (2) he "did nothing to limit the content of the amended motion," and (3) he did "nothing to delay the filing." This was corroborated by the testimony of defendant's second appointed counsel at the *Sanders* hearing when he testified that: (1) he failed to file a timely motion because there was insufficient time for him to investigate, research and draft the motion, (2) nothing that White did or said or refused to do interfered with his ability to file a timely amended motion, and (3) it was the decision of the public defender's office, rather than White, "to switch

attorneys." Defendant's first appointed attorney confirmed that the decision "to switch attorneys" was made solely by the public defender's office. Based on the record, we conclude that defendant White was abandoned by the decision of the public defender's office to change defendant's counsel fourteen days before the end of the sixty day period for filing the Rule 29.15 amended motion without leave of court, by his first appointed counsel's withdrawal without leave of the motion court, and by both his first and second appointed counsel's failure to file a timely amended motion. We find that no action or inaction by White contributed to the delayed filing.

Rule 29.15(e) states: "For good cause shown, appointed counsel may be permitted to withdraw." At a minimum, this means that the motion court must enter an order finding good cause and granting permission for the exchange of counsel. No such order was granted in this case. Neither of defendant's appointed counsel should have participated in this exchange of counsel (1) without an order showing good cause, or (2) so near to the deadline for filing a timely amended motion. An attorney should not withdraw so close to the filing date that the second counsel has insufficient time to meet all the requirements of Rule 29.15. By his own admission, defendant's second counsel did not have enough time to file a timely amended motion after he entered his appearance. Moreover, the conduct of the public defender's office is at least questionable in removing defendant's first appointed counsel fourteen days prior to the filing date, especially since it was done without leave of the motion court. Although we pass no final judgment on either of defendant's attorneys or the public defender's office, we request that the Disciplinary Counsel investigate and determine whether any considerations or disciplinary rules were broken.[2]

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[2]All public defenders are required to be attorneys licensed to practice law in Missouri. § 600.021, RSMo 1986. We believe that Rule 29.15 permits the motion court to appoint a public defender's office or an individual attorney

Second, defendant argues that he was abandoned by counsel's failure to ensure that the motion was properly verified. As noted earlier, the amended motions met the verification requirement for the purpose of jurisdiction. Thus, the defendant was not abandoned in regard to the verification requirement. This is especially true since defendant's intentional conduct resulted in the verification being signed prior to the completion of the amended motions. *Sanders*, 807 S.W.2d at 495. This point is denied.

Finally, defendant argues that post-conviction counsel abandoned him by failing to allege sufficient facts and grounds for relief in his amended motions. This argument has no merit. Absent total abandonment, such as failure to properly file an amended motion as required by Rule 29.15(e), defendant has no

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to represent a movant. Rule 29.15 only states that the "court shall cause counsel to be appointed for the movant." It does not require that the court appoint a specific attorney to represent a movant in filing a 29.15 motion. The court, therefore, can appoint a public defender's office because that will "cause counsel to be appointed for the movant." Rule 29.15(f) (emphasis added). Moreover, this Court recognized the appropriateness of such an appointment in White, 813 S.W.2d at 864, citing Schneider, 787 S.W.2d at 720, when we held "that the effective date of appointment of counsel is the date on which the office of public defender is designated rather than the date of counsel's entry of appearance."

The public defender's office has requested, in certain instances, that the courts appoint one of its offices rather than a specific attorney to represent a movant pursuant to Rule 29.15. If the court appoints a public defender's office to represent a movant, we will hold the supervising attorney of that office responsible as if that attorney had been appointed individually to represent movant. Once an individual attorney from a public defender's office enters an appearance on behalf of a movant, we will also hold that attorney responsible as if appointed by name in the court's order. In this case, the "State Public Defender for the Sixteenth Judicial Circuit [was] appointed to represent movant in his motion for relief pursuant to Rule 29.15." Thus, the attorney in charge of that office should be held responsible for the conduct of the public defender's office in this case.

right to effective assistance of Post-conviction counsel. The United States Supreme Court has stated that there is no constitutional right to post-conviction counsel and that failure of the attorney to comply with procedural rules in a collateral proceeding falls on the shoulders of the defendant. *White*, 813 S.W.2d at 867 (Holstein, J., concurring), *citing Coleman v. Thompson* 501 U.S.____, 111 S.Ct. 2546 (1991). Thus, a defendant's right to post-conviction counsel exists only under Rule 29.15(e) and our holdings in *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991), and *Sanders*, 807 S.W.2d 493.

Rule 29.15 requires only that the attorney meet with the movant, ascertain whether sufficient facts supporting the grounds in the pro se motion are asserted, and ascertain whether the movant has included all grounds known to him as a basis for attacking the judgment and sentence. Rule 29.15(e). "If the motion does not assert sufficient facts or include all grounds known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and grounds." *Id.* Absent total abandonment of the requirements set forth in Rule 29.15, a defendant has no recourse under *Luleff* and *Sanders*.

Here, counsel met with White and ascertained that an amended motion needed to be filed but failed to file it properly, resulting in abandonment under *Luleff* and *Sanders*. Defendant acknowledges in his affidavit, however, that he told his second appointed counsel of all grounds known to him. Based on that information, defendant's second counsel filed an amended motion, which stated additional facts and grounds for relief pursuant to Rule 29.15(e). Neither the defendant nor his second appointed counsel testified at the Sanders hearing that the first or second amended motion failed to raise all grounds known to them at the time the motions were filed. Therefore, there is nothing in the record to indicate that defendant's second appointed counsel failed to met the minimum requirements set forth in Rule 29.15.

Even if White claims that his second counsel failed to raise all meritorious grounds known to White prior to the filing of the amended motions, defendant waived all challenges to the completeness and accuracy of the amended motions when he signed the verification in blank. We will not permit a movant to falsify a verification and then argue that the contents of the amended motion were insufficient. The defendant's st abandonment argument is denied.

ABANDONMENT REMEDY

Having concluded that the defendant was abandoned by post-conviction counsel's failure to file a timely amended motion, we must decide what remedy is available to the defendant. We have resolved this issue in two ways: (1) appointing new counsel to file an amended motion, or (2) instructing the motion court to treat the previously drafted amended motion as timely. The previous cases, however, have been procedurally different than this one in regard to whether an amended motion was filed and whether the court ruled on the amended motion. In *Luleff*, 807 S.W.2d 495, we remanded to the motion court to determine whether movant was abandoned by counsel's failure to file an amended motion. We instructed the court that if movant was not negligent or otherwise a party to his appointed counsel's failure to file an amended motion, the court should appoint new counsel to file an amended motion if counsel determines that there are any meritorious claims for relief. *See also State v. Bradley*, 811 S.W.2d 379 (Mo. banc 1991). In *Sanders*, 807 S.W.2d 493, where counsel drafted an amended motion but failed to file it timely, we instructed the motion court to treat the amended motion as timely if counsel was exclusively responsible for its late filing. Prior to the remand in *Sanders*, the motion court had dismissed the amended motion as untimely and did not rule on it. In this case, however, the motion court ruled on the untimely amended motions prior to the defendant's appeal.

Defendant contends that we should follow *Luleff* and allow the motion court to appoint new counsel to file a third amended 29.15 motion. The State persuasively argues, however, that in doing so we would permit the defendant a third bite at the apple, which would contravene the purpose of Rule 29.15. The State suggests that we dismiss both motions as untimely. Although we agree with the State that the second amended motion was properly dismissed as untimely, we reinstate defendant's first amended motion pursuant to *Sanders*.

Defendant White was only abandoned with regard to the timing of his first amended motion, not as to its content. In his affidavit, defendant White stated that he gave his appointed counsel all of the information he had with regard to filing an amended motion. Defendant also signed the verification in blank, which resulted in his waiving any claim that the amended motions were incomplete. Plus, neither the defendant nor his second appointed counsel testified at the *Sanders* hearing that the first amended motion did not contain all grounds known to them at the time it was filed. Defendant's counsel merely complained that the first amended motion was late because be was not given enough time. Therefore, defendant was not abandoned as to the content of his first amended motion. He was only abandoned as to the timeliness of his first amended motion. We, therefore, conclude that defendant's first amended motion should be reinstated.

The defendant is not entitled, however, to have his second amended motion reinstated. We have already determined that defendant was abandoned only by the late filing of his first amended motion. By reinstating the first amended motion, we have cured the timeliness problem, and the first amended motion now meets the minimum requirements of Rule 29.15. To let the defendant also have the benefit of the second untimely amended motion would grant the defendant additional relief beyond that which he was originally entitled to receive

under Rule 29.15. Defendant White only had the right to have his appointed counsel draft one amended motion that complied with the requirements of Rule 29.15(e). We are unwilling to grant the defendant any additional relief beyond that which is required by Rule 29.15. Therefore, we will not reinstate the defendant's untimely second amended motion.

Defendant contends, however, that the motion court failed to rule on all of defendant's points in his first amended motion. On remand, the motion court should determine the validity of this contention, which is similar to defendant's claim regarding his pro se motion. The motion court should have drafted findings and conclusions on all of the issues raised in defendant's pro se and first amended motions. On remand, the court should make findings of fact and conclusions of law in accordance with *Barry*, 850 S.W.2d 348.

Defendant also argues that he was denied his right to due process under the Missouri and United States constitutions because the prosecutor drafted the August 1, 1989, findings of fact and conclusions of law. Defendant further argues that the judge's alleged delegation of his duties to the prosecutor deprived White of his right under Article V, Section 1, of the Missouri Constitution to have his post-conviction motion decided by a court vested with judicial power.

Adopting all or part of a party's proposed findings, or adopting by reference the wording of a party's motion, has become a common practice among lawyers and judges in both criminal and civil cases. Courts frequently request both parties to draft findings of fact and conclusions of law that conform to how the court intends to resolve the issues in dispute. The court then takes the parties' recommendations under advisement and either drafts its own findings of fact and conclusions of law or adopts one of the parties' findings in whole or in part. As long as the court thoughtfully and carefully considers the parties'

proposed findings and agrees with the content, there is no constitutional problem with the court adopting in whole or in part the findings of fact and conclusions of law drafted by one of the parties. Once the trial court determines that it agrees with one of the parties' findings and signs the order, the court has in effect adopted that party's findings as its own.

It is clear from the record that the prosecutor drafted some or all of the August 1, 1990, findings of fact and conclusions of law. We find no constitutional violation regarding this practice as long as the trial court is satisfied that its findings of fact and conclusions of law reflect its independent judgment. Because there *was* no evidence presented that the findings and conclusions did not reflect the court's own independent judgment, this point is denied.

CONCLUSION

Defendant's appeal based on the failure of the motion court to rule on all the issues contained in his pro se and first amended 29.15 motions is reversed and remanded for further proceedings consistent with *Barry*, 850 S.W.2d 348.

ELWOOD L. THOMAS, Judge

All concur.

SUPREME COURT OF MISSOURI
en banc

LEAMON WHITE,	)	**FILED**
	)	**FEB 25, 1997**
Appellant,	)	
	)	
v.	)	**No. 78459**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Jackson County
Honorable Alvin C. Randall, Judge, and Honorable David W. Shinn, Judge

Leamon White was convicted of first degree murder and sentenced to death. This is an appeal from a judgment denying relief pursuant to a motion to vacate judgment and sentence under Rule 29.15. White's primary contention is that his trial attorneys were ineffective in their investigation and presentation of witnesses, conduct of voir dire; sentencing phase strategy, and that they sought to undermine his chances for post-conviction relief in order to insulate themselves from criticism for their deficient performance. Without holding an evidentiary hearing, the circuit court overruled White's Rule 29.15 motion. We find that none of the numerous allegations made by White in his motion for post-conviction relief require an evidentiary hearing. The judgment of the circuit court is affirmed.

I.

White's Rule 29.15 motion has been before this Court on two prior occasions. In the first appeal, *State v. White*, 813 S.W.2d 862 (Mo. banc 1991), *cert. denied*, 502 U.S. 1103

(1992), the facts were set out at length. To summarize, in January 1987, three men entered the home of Don Wright and Carol Kinney, purportedly to buy crack cocaine. Instead, the men tied up Wright, Kinney and her children, Deonta and Raymond, and Earnest Black, a guest in the home. The men beat Mr. Black and Mr. Wright, interrogating them about where to find drugs. Then the men slit Mr. Wright's and Ms. Kinney's throats and left the house, after turning on the gas stove and blowing out the pilot lights. As a result of the savage attack, Don Wright died of strangulation and asphyxiation. The children, who were in bed in a nearby bedroom during the attack, were later able to free themselves and call police. At trial, Ms. Kinney and Mr. Black identified Leamon White as one of the attackers. White was convicted of first degree murder and sentenced to death. On appeal, this Court affirmed the conviction and sentence.

In that opinion, the Court described the circumstances surrounding the filing of White's various motions for post-conviction relief. In August 1989, White filed a pro se motion under Rule 29.15, but failed to have it notarized, apparently because no notary was available to him in prison. The motion court appointed counsel, who later requested an extension of time to file an amended motion. About two weeks before the extension expired, the first attorney withdrew, and another was appointed. Several days after the extended filing period had expired, the newly appointed attorney filed a first amended motion and an application for a further extension of time. That extension was granted, and a second amended motion was filed. The motion court issued a judgment, which included findings of fact and conclusions of law denying relief without an evidentiary hearing on August 1, 1990. Without addressing the motion court's substantive judgment, this Court remanded for findings on whether White had been abandoned by post-conviction counsel.

On remand, the circuit court dismissed the Rule 29.15 motion as not properly verified. In the alternative, the court determined that White was not abandoned by post-conviction counsel and reinstated the original findings and conclusions overruling the motion on the merits. White again appealed the judgment.

In the second appeal, *State v. White*, 873 S.W.2d 590 (Mo. banc 1994), this Court ruled that White's signature was sufficient verification for the pro se Rule 29.15 motion. However, the Court found both amended motions to be untimely because the motion court lacked jurisdiction to grant more than the prescribed thirty-day extension. But this Court reinstated the first amended motion because it concluded that trial counsel's failure to file a timely amended motion constituted abandonment. The Court, however, refused to reinstate the second amended motion, holding that White only had the right to one amended Rule 29.15 motion drafted by counsel. The Court also found that the motion court had failed to address all claims set forth in the pro se and first amended motions. Accordingly, the Court remanded for findings of fact and conclusions of law addressing all claims in the pro se and first amended motions.

On remand, the motion court found that the issues raised in the first amended motion had been addressed in the first judgment on August 1, 1990, and entered new findings of fact and conclusions of law on the claims made in the pro se motion, denying all relief without an evidentiary hearing.

This Court now considers only the motion court's rulings on the allegations contained in White's pro se and first amended Rule 29.15 motions. Review of the rulings is limited to determining whether they are clearly erroneous. *Rule 29.15(j)* (1988). Where the trial court makes findings of fact and conclusions of law, a proper result will be affirmed even if one

of the conclusions is in error. *State v. Bradley*, 811 S.W.2d 379, 383 (Mo. banc 1991) (per curiam).

II.

White argues that the trial court erred in refusing to grant an evidentiary hearing on the numerous claims of ineffective assistance of counsel raised in his Rule 29.15 motions. An evidentiary hearing is not required where "the motion and the files and record of the case conclusively show that movant is entitled to no relief[.]" *Rule 29.15(g)* (1988).

A Rule 29.15 motion is subject to requirements of timely filing and limitations on amendments. *Rule 29.15(b)(f)* (1988). Moreover, such motion must be substantially in the form provided by Form 40. *Rule 29.15(b)* (1988). Paragraph 8 of Form 40 requires a movant to state "concisely all the grounds known to you for vacating, setting aside or correcting your conviction and sentence." Paragraph 9 of Form 40 requires a concise statement of "the facts which support each of the grounds set out in (8), and the names and addresses of the witnesses or other evidence upon which you intend to rely[.]" Once counsel is appointed, "[i]f the motion does not assert sufficient facts... counsel shall file an amended motion which sufficiently alleges the additional facts and grounds." *Rule 29.15(e)*. The redundant requirement to plead facts makes clear that a Rule 29.15 motion is no ordinary pleading where missing factual allegations may be inferred from bare conclusions or implied from a prayer for relief.

A Rule 29.15 motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment of a court. While courts are solicitous of post-conviction claims that present a genuine injustice, that policy must be balanced against the policy of bringing finality to the criminal process. Requiring timely pleadings containing

reasonably precise factual allegations demonstrating such an injustice is not an undue burden on a Rule 29.15 movant and is necessary in order to bring about finality. *See Fields v. State*, 572 S.W.2d 477. 483 (Mo. banc 1978). Without requiring such pleadings, finality is undermined and scarce public resources will be expended to investigate vague and often illusory claims, followed by unwarranted courtroom hearings. For that reason, it has been held that no evidentiary hearing will be required unless the motion meets three requirements: "(1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters complained of must have resulted in prejudice to the movant." *State v. Starks*, 856 S.W.2d 334, 336 (Mo. banc 1993). Thus, to obtain an evidentiary hearing on claims of ineffective assistance of counsel, the movant must allege facts, not refuted by the record, showing (1) that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and (2) that he was thereby prejudiced. *See Hill v. Lockhart*, 474 U.S. 52, 60 (1985); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because none of White's allegations satisfy this standard, his motion was properly overruled without an evidentiary hearing.

A.

White alleges counsel was ineffective in that:

> [He] required and compelled movant to take the witness stand.., to condone, verify and/or sanction trial counsels [sic] trial strategy, i.e., what witnesses to call, what questions to ask and what evidense [sic] to marshall [sic] in general. This improper conduct of counsel impermissably [sic] invaded the provence [sic] of the attorney cliant [sic] relationship and

exposed movant to cross-examination by the state. Said conduct was prejudicial to movant.

The pleadings purport to allege improper conflict of interest between movant and trial counsel. Inherent in every criminal case is counsel's desire to protect himself from future claims of ineffective assistance of counsel and the defendant's desire to preserve claims of ineffective assistance of counsel in the event of conviction. It is not improper for counsel to take steps to protect his own interest if in doing so, he does not disclose confidences of his client which harm the client's interest. There is no per se rule that prejudice will be presumed when counsel makes a record that has the effect of refuting subsequent claims of ineffective assistance of counsel. As with other matters, a post-conviction pleading asserting ineffective assistance of counsel must allege facts showing what counsel did or said that was improper and facts showing how the movant was prejudiced. Here counsel is faulted for having asked movant on a number of occasions if movant agreed with unspecified strategic decisions of counsel. Aside from conclusions, no specific information disclosed by the questioning is alleged in the pleadings. Neither is there any allegation as to how such disclosure might have harmed movant so as to undermine confidence in the outcome of the trial.

Such conclusions, without more, do not assert either ineffective representation or prejudice. Movant did not plead facts entitling him to relief on this issue. Thus, he was not entitled to an evidentiary hearing.

B.

White alleges he was denied effective representation of counsel because one of his attorneys represented other, unrelated, capital defendants simultaneously. He alleges that one of his trial attorneys "was unable to devote his full time and

attention to movants [sic] trial due to proceedings being conducted in other forums at the same time as movants [sic] trial, thus resulting in [the attorney] leaving movants [sic] murder trial while court was in session to attend other proceedings." In denying this claim, the motion court concluded:

> [M]ovant's allegation... fails to allege how he was prejudiced by counsel's representation of other clients while movant's trial was in progress, nor has movant alleged any facts regarding counsel's supposed conflict of interest. Movant's allegation is especially meritless considering that he was also represented at trial by [a second attorney], about whom movant has not made any allegation of conflict of interest.

This conclusion is not clearly erroneous as appellant's contention is refuted by the record. White fails to acknowledge the fact that he was represented by two trial attorneys. White's claim would lead one to incorrectly believe he was represented by only one. White fails to challenge co-counsel's representation during the periods in which one of his attorneys was allegedly absent. White also fails to set forth with specificity how he was prejudiced by the attorney's absence. The motion court properly rejected this claim without a hearing.

C.

White contends trial counsel was ineffective in the following regard:

> [C]ounsel engaged in unethical and improper conversation with the victims [sic] immediate family members. Said conversations involved discussions by defense counsel concerning the

> merits of movants [sic] defense and movants [sic] trial strategy, all to the prejudice of movant. Defense counsel knowingly violated the attorney-cliant [sic] relationship by divulging the aforestated, and this conduct is move [sic] grevious [sic] when defense counsel knew or reasonably should have known that the victims [sic] family members were relaying all information to the States [sic] attorney.

The motion court rejected White's claim on the basis that no showing of prejudice was made. The court properly denied an evidentiary hearing on this claim as White's allegations are merely conclusions and speculation.

By reading the pleadings, one is unable to discern what was said by counsel that was unethical or improper or what tidbits of trial strategy were communicated that might conceivably have prejudiced the movant. White's own brief demonstrates the speculative nature of the claim where he says,

> *If* Mr. White's attorney was, in fact, discussing the merits of Mr. White's defense, and his trial strategy with members of the family and *if* he knew, or reasonably should have known, that the family members were conveying that information to the prosecutor, *then* counsel was guilty of an unethical breach of loyalty to his client.

(Emphasis added.) To obtain an evidentiary hearing, a movant must allege facts, not speculative conclusions, warranting relief. *Starks*, 856 S.W.2d at 336. As White does not specify what was disclosed to the victim's family members, he fails to show that but for the disclosures, the outcome of the trial may have been different. Because of the failure to allege these facts, the motion

court properly denied the claim.

D.

White contends that counsel was ineffective for failing to conduct pre-trial interviews or depositions of key witnesses, including Carol Kinney, Earnest Black, Deonta Kinney, and Raymond Kinney.

In its findings of fact and conclusions of law, the motion court found that defense counsel adequately utilized alternatives to conducting interviews and depositions of the eyewitnesses:

> In this case, while defendant's attorney's [sic] had not talked to the eyewitnesses in this case or deposed them, they had statements given by those witnesses in the police reports, as well as depositions given by those same witnesses in the defendant's and co-defendant's cases[,] either of which could have been used to impeach those witnesses if they thought it the correct strategy to utilize. The trial transcript is replete with instances with which defense counsel used these depositions and police reports to impeach the State's witnesses.

No challenge is made to the trial court's finding of the existence of depositions from other cases and police reports containing statements of the witnesses. The record plainly supports the motion court's finding on this issue. In view of the availability of depositions from other related cases and statements of witnesses in investigative reports, the motion court correctly found that the attorneys' failure to interview and depose witnesses does not amount to ineffective assistance of counsel. There is a strong presumption that counsel made all significant decisions in the exercise of reasonable professional

judgment. *State v. Stepter*, 794 S.W.2d 649, 657 (Mo. banc 1990) (citing *Strickland*, 466 U.S. at 689). White has failed to allege facts that take this case outside the presumption that his attorneys' decision not to conduct a more probing investigation of the witnesses was something other than a reasonable choice of strategy.

In addition, the pleadings fail to allege facts that, if true, would entitle movant to relief. Specifically, White fails to identify what the attorneys would have discovered, that was not otherwise known to trial counsel, had they interviewed and deposed the witnesses. White argues in his brief on appeal that had his attorneys interviewed and deposed Raymond and Deonta Kinney, counsel would have discovered that the children had identified another man, A.J., as the killer. However, the motion suggests only that one of three assailants was not movant. How that exculpates movant is not explained.

Finally, the trial transcript directly refutes an inference that White's trial attorneys were unaware of what the children knew about the crime. Raymond Kinney was called to testify as a defense witness. Raymond testified that he and Deonta were in bed when the incident took place. Their bed was in a separate room from where the assaults and murder took place. The lights were off in the bedroom. Raymond saw one assailant and that person spoke with a Jamaican accent. Raymond further testified that the defense attorneys had brought him to court on a previous occasion to look at White and at that time Raymond did not recognize White. Apparently, White's counsel was aware that Raymond would testify favorably and had seen and talked to him prior to trial. These facts refute White's suggestion that his attorneys failed to interview the children or take steps to determine what the children knew about the crime.

Because White failed to allege what facts, if any, would have been developed by a more extensive interview or

deposition of witnesses and how that would have aided movant, the pleading fails to allege facts entitling him to relief on these grounds. Moreover, the claim is refuted by the record.

F.

In his first amended motion, White makes the following allegations:

> D. That counsel *failed to... adduce testimony* from [Ben] Kinney during trial that the victim of the murder, Don Wright. or his girlfriend - eye witness [sic] and co-victim, Carol Kinney were drug dealers of cocaine to establish that others could have committed these offenses[.]
>
> E. That counsel *failed to adduce testimony* from Ben Kinney that Ben Kinney and Don Wright sold drugs for two men by the names of AJ and Josh; this was relevant because AJ and Josh had threatened Ben Kinney and Raymond and Deonat [sic] Kinney had identified AJ as the second perpetrator of this murder: this cor flicted with Carol Kinney and Earnest Black saying that the second perpetrator was Movant[.]
>
> F. That counsel *failed to adduce testimony* from Deonat [sic] and Raymond Kinney that AJ was the second perpetrator of this murder not Movant[.]

(Emphasis added.)

All three paragraphs assert the obvious and irrefutable truth that defense counsel "failed to adduce testimony" favorable to movant. The question remaining is whether the bare allegation of counsel's failure to adduce certain testimony entitles movant to any relief. Clearly, the answer is no. "[T]o prevail on a claim of ineffective assistance of counsel due to counsel's failure to call a witness to testify, the movant must show that the witness would have testified if called and that the witness's testimony would have aided the movant's defense." *State v. Johnson*, 901 S.W.2d 60, 63 (Mo. banc 1995). The burden is on movant to plead facts, not conclusions, establishing not only who the witnesses were but what they would testify to, if called, and that such evidence would provide a viable defense. White's pleadings stop short of directly alleging what the witnesses would testify to, if called. As such, they are deficient and no hearing was required on these claims.

The requirement that a movant directly allege facts to which the witnesses would have testified, if called, is more than a technicality. In every post-conviction case, it may truthfully be said that there are innumerable witnesses whose favorable testimony on a myriad of issues was not adduced by trial counsel. The subtle wording "counsel failed to adduce" suggests what witnesses might say without directly stating that they were available and would have testified favorably to movant, if called. To declare such pleading to be sufficient would permit a post-conviction litigant and lawyer to sandbag the State and the motion court with numerous unsubstantiated claims of deficient performance of trial counsel in failing to "adduce" testimony from witnesses. The State would then be put to the task of having to investigate what the witnesses would say, and the court would be required to hold a hearing, even though there may not be a scintilla of evidence that the witnesses were available to testify and that they would, in fact, testify favorably to the movant. Meanwhile, the post-conviction movant and the post-conviction counsel could truthfully say they had made no

misrepresentation of fact to the court, which would subject them to sanctions under the Rules of Civil Procedure or, in the case of a lawyer, sanctions pursuant to the Rules of Professional Conduct.[3] To hold such allegations sufficient would turn the pleadings process into clever gamesmanship.

Finally, even if one assumes the motion alleged that one or both of the Kinney children, if called to testify, would have identified A.J. as one of the three assailants, the allegations are still insufficient. All that may be said of such assumed testimony is that one of three assailants was not movant. No facts are asserted showing movant was not one of the other two persons who committed the murder, and no facts alleged explain how the testimony of the children would tend to exculpate White.

F.

White alleges that "counsel failed to attack the pretrial identification of Movant by Carol Kinney or the in-court identification of Movant by Carol Kinney or Earnest Black by way of a Motion to Suppress when the identification procedures utilized by police were unnecessarily suggestive and conducive to an irreparable mistaken identification[.]" What these allegedly "suggestive and conducive" procedures were,

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[3]Rule 55.03(b) provides in part: "By presenting or maintaining a claim . . . in a pleading, . . . an attorney or party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that:

. . . .

(3) the allegations and other factual contentions have evidentiary support. . ."

Rule 4. Rules of Professional Conduct 3.1 provides in part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. . ."

however, is not specified in the motion. The motion fails to provide sufficient factual allegations to support the conclusion that the police used improperly suggestive identification. As such, the pleading is deficient and this claim was properly denied without a hearing.

G.

White alleges that his trial attorneys were ineffective because they failed to impeach witnesses Black and Kinney with "prior inconsistent statements." This allegation, even if true, is insufficient to warrant relief.

Failure to impeach a witness with a prior inconsistent statement does not, per se, constitute deficient performance of counsel. *See, e.g., Roberts v. State*, 775 S.W.2d 92. 9495 (Mo. banc 1989), *cert. denied*, 494 U.S. 1039 (1990). A defense attorney may decide not to impeach a witness as a matter of trial strategy. *Id.* White's pleadings fail to specify the nature or content of the alleged "prior inconsistent" statements. A bare allegation that certain witnesses made "prior inconsistent" statements without stating what was said and how it conflicted with what was testified to at trial is a conclusion, not a fact. Many inconsistent statements are so insignificant as to be meaningless and others are so easily explainable as to not justify being presented at trial. Because White fails to disclose the content and circumstances of the supposed inconsistent statements, he provides no factual basis for a finding of either inadequate representation or prejudice under the *Strickland* test. Because White failed to allege facts entitling him to relief, the motion court properly denied this point without an evidentiary hearing.

Moreover, the record refutes White's claim that his attorneys failed to impeach Carol Kinney and Earnest Black with prior inconsistent statements. The trial transcript reveals

several instances in which both Kinney and Black were questioned about prior inconsistent statements given to police, to an investigator or at a deposition, if White's claim is that his attorneys were ineffective in failing to go far enough in impeaching Kinney and Black, it must be rejected because the *extent* of impeachment is a decision of trial strategy. *See Kenley v. State*, 759 S.W.2d 340, 349 (Mo. App. 1988) (per curiam), *rev'd on other grounds sub nom. Kenley v. Armontrout*, 397 F.2d 1298 (8th Cir. 1991). In virtually every case, the extent of cross-examination must be left to the judgment of counsel. *Id.* The old adage among trial lawyers that "you only need to prove a witness is a liar once" has particular application here.

H.

White contends that counsel was ineffective in his cross-examination of witness Earnest Black, resulting in the witness identifying appellant as one of the perpetrators. White also alleges that counsel was ineffective in not making a motion to suppress the in-court identification. On this claim, the motion court concluded as follows:

> It is clear from the transcript that counsel's cross examination of Black was precisely in line with the trial strategy of misidentification. Black identified movant in-court [sic] on direct examination and it was clearly counsel's strategy to draw attention to the fact that Black had never been able to identify him before. It is also difficult to see how movant was prejudiced by this questioning since Black had already identified movant on direct as had Carol Kinney both before and at trial. At most. therefore, Black's response to counsel's questions was cumulative.

The ruling of the motion court is not in error. White has not alleged facts that would warrant relief if true. Review of the record demonstrates that defense counsel sought to show that the witness had misidentified White. Black had testified on direct examination that White "looks like the second man" involved in the murder. Counsel's cross-examination of Black regarding his confidence in his identification of White as one of the perpetrators was consistent with defense counsel's misidentification theory. Counsel's decision to cross-examine Black in this manner was a strategy decision, which will not support a finding of ineffective assistance. *See State v. Storey*, 901 S.W.2d 886, 893 (Mo. banc 1995). Furthermore, in light of Mr. Black's and Ms. Kinney's other identifications of White, the cross-examination complained of by White would not have resulted in prejudice.

I.

White alleges that counsel was ineffective for failing to object to the presentation, at trial, of a videotape lineup in which he was identified by State's witnesses before trial. White's reliance on *State v. Seever*, 733 S.W.2d 438 (Mo. banc 1972), is misplaced. In *Seever*, the State's witness, a child, made a videotaped statement detailing her account of defendant's sexual contact with her. At trial, the State called the victim to testify, after playing her videotaped statement for the jury. The Court held that the showing of the video was improper bolstering. *Id.* at 441. Unlike *Seever*, the videotape at issue in this case was not testimony offered to duplicate that ora witness. Rather, the videotape was admissible evidence of the circumstances of the initial out-of-court identification. The motion court did not err in finding that the trial court would have overruled this objection. Trial counsel cannot be deemed ineffective for failing to object to admissible evidence. *See Clemmons v. State*, 785 S.W.2d 524, 529 (Mo. banc 1990), *cert. denied*, 498 U.S. 882 (1990).

J.

White argues that his attorneys were ineffective in failing to call an expert to testify on the effect of drug use on the mind in regard to receiving, processing and interpreting information. According to White, "[h]ad counsel presented said expert testimony[,] the jury could have reasonably found that the incourt [sic] identification of movant was not reliable due to the witnesses [sic] admitted drug consumption and influence at the cogent times."

White fails to allege sufficient facts to establish that trial counsel's performance was deficient. "To support a charge of ineffective assistance of counsel based on failure to secure the testimony of an expert witness, at a minimum, movant is required to show what the evidence would have been." *State v. Twenter*, 818 S.W.2d 628, 636 (Mo. banc 1991). Here, White does not specify what an expert's testimony would have been, but speculates that upon some presumed testimony the jury "could have easily found" the in-court identifications unreliable.

White also fails to allege facts establishing prejudice. White's attorneys made drug use of the witnesses an issue without expert testimony. Both Ms. Kinney and Mr. Black admitted on the stand that they had taken drugs before the killing and were cross-examined on the issue of how the drug use affected their perceptions. Thus, even if true, this allegation does not entitle White to relief as it fails both prongs of the *Strickland* test.

K.

White claims that "counsel failed to object to the State withholding and supressing [sic] evidense [sic]" that "[t]he State had shown witness[es] Kinney and Black a photograph of

[White] prior to these witnesses making an identification. . . ." But, as White says in his motion, this allegedly withheld evidence came to light during trial. As the motion court found, both Ms. Kinney and Mr. Black were cross-examined on their failure to identify White from the photograph. Furthermore, White admits that his attorneys were informed about the photo by his previous attorney. Thus, White fails to allege facts establishing that he was prejudiced by his counsel's failure to object to the State's alleged withholding of evidence. The motion court did not err in denying this point without an evidentiary hearing.

L.

In White's pro se motion, he claims that his trial counsel was ineffective for failing to call an alibi witness. This allegation again fails to allege facts entitling movant to relief. White provides no details other than the name of the witness and the unsupported claim that the witness would provide an alibi. White fails to set forth what the alleged witness would testify to, if called, and fails to describe how the witness's testimony would provide an alibi. White has failed to allege any facts showing (1) that the witness could have been located through a reasonable investigation, (2) what the witness would have testified to if called, and (3) that the witness's testimony would have provided a viable defense. *State v. Ramsey*, 864 S.W. 320, 340 (Mo. banc 1993), *cert. denied*, 511 U.S. 1078 (1994). As such, the motion court did not err in denying an evidentiary hearing on trial counsel's failure to call White's alleged alibi witness.

M.

White alleges that counsel was ineffective for "fail[ing] to object to the court informing members of the venire that the governor could pardon Movant[.]" White's claim that the trial

court erred in giving such an instruction was rejected on direct appeal. *White*, 813 S.W.2d at 865. Thus, the motion court did not err in finding that an objection to the court's statement would have been meritless.

N.

White contends that counsel rendered ineffective assistance upon failing to object to the State's improper voir dire, wherein the prosecutor did not limit the questioning to the general circumstances of the offense but instead provided specific details in order to predispose the jurors. "We do not permit counsel . . . to try the case on voir dire by presentation of the facts in explicit detail." *State v. Antwine*, 743 S.W.2d 51, 58 (Mo. banc 1987), *cert. denied*, 486 U.S. 1017 (1988). However, a revelation of some portion of the facts of a case during voir dire is necessary to ascertain whether a potential juror's views would substantially impair his ability to be impartial and perform his duties in accordance with the court's instructions. *State v. Gray*, 887 S.W.2d 369, 382 (Mo. banc 1994), *cert. denied*, ___U.S.___, 115 S.Ct. 1414 (1995). White "fails to identify any statements by the State that were either argumentative or prejudicial in the context in which they were made." *Antwine*, 742 S.W.2d at 59. Without alleging any facts showing prejudice, White fails to establish that the State's voir dire was improper. *See id.* Hence, failure to object to the State's voir dire cannot provide a basis for a claim of ineffective assistance of counsel. The motion court properly denied this point.

O.

White contends that trial counsel was ineffective in that he wasted a peremptory strike on a venireperson the trial court had already excused for cause due to illness. White fails to allege prejudice based on counsel's use of the peremptory strike.

He must allege facts demonstrating that but for counsel's allegedly deficient performance, the result of the trial would have been different. *See Storey*, 901 S.W.2d at 893. Because White makes no such allegation, White is entitled to no relief on this claim.

P.

White alleges that "counsel failed and refused to conduct any meaningful voir dire examination, and failed and refused to make any objections... to the states [sic] request for jurors being struck for cause. . . . Counsel also failed to make any effort to rehabilitate potential jurors who spoke ambiguously as to their position concerning the imposition of the death penalty." White, however, fails to specify what was deficient about counsel's voir dire examination. The motion is also silent as to which strikes counsel should have objected to, and which jurors counsel should have attempted to rehabilitate. Because White has failed to plead any specific information, his pleading does not warrant relief.

However, the motion court found that White had alleged sufficient facts to allow a judgment on this issue as to one juror. The court further found that this juror had expressed a substantial inability to impose the death penalty and was properly struck for cause. The juror in question said that he was opposed to the death penalty for religious reasons and could not consider the death penalty. It was proper to strike this juror for cause. *See State v. Six*, 805 S.W.2d 159, 166 (Mo. banc 1991), *cert. denied*, 502 U.S. 871 (1991). The motion court did not err in concluding that objecting to the strike of this juror would have been fruitless.

Q.

White alleges counsel's ineffectiveness for failing to

object to the trial court's voir dire examination wherein the court asked whether jurors could consider sentencing White to death, rather than asking whether they could consider the entire range of punishment. The record clearly refutes White's claim. The court examined certain venirepersons on their ability to consider the range of punishment. The court examined several venirepersons, using essentially the same phrasing each time: "if the jury finds the defendant guilty of murder in the first degree, the only possible sentences are life in prison without parole and the death sentence. Would you be able to consider both of those punishments?" Thus, the record refutes White's allegation by reflecting that the court asked whether the venireperson could consider the range of punishment. The motion court properly denied this claim.

R.

White contends that counsel was ineffective in not challenging the fact that voir dire had been conducted off the record, by a judge other than the trial judge, and without appellant being present. White alleges that, as a result, he "was denied a full and complete transcript from which to perfect his appeal." This allegation is clearly refuted by the record, which includes a transcript of the voir dire proceeding. White does not specify what portions of the voir dire proceeding are missing from the trial transcript. Though White alleges that he was not present at some portion of the voir dire, he fails to identify at what stage he was purportedly absent. He does not contend that he was not present for any portion of the general or death qualification phases of the voir dire. Therefore, as the motion court concluded, White does not allege prejudice with any specificity and his claim, therefore, does not warrant a hearing.

S.

White contends that counsel rendered ineffective

assistance "when counsel failed and refused to properly object to the court reading instructions to the jury, that only became proper at the close of evidense [sic], during voir dire." The motion court concluded the claim was meritless, finding:

> [T]he transcript clearly shows that all instructions were read at the appropriate time, and movant has failed to show how this has prejudiced him. The only instruction which was read at an irregular time was the instruction explaining what an objection being sustained meant, which was reread, because a juror didn't understand it the first time it was read.

Without identifying the instruction that was purportedly improperly read, and without any supporting authority, White contends that the motion court's finding is clearly erroneous and that "without a hearing it is impossible to know why counsel failed to object and whether the jurors unduly emphasized this instruction to Mr. White's detriment." The record reveals no patently improper instruction during voir dire. White fails to allege facts, not refuted by the record, warranting relief. In the absence of such factual allegations, he is not entitled to an evidentiary hearing.

T.

White contends that counsel was ineffective in not making a proper objection during voir dire when the State's attorney advised the jury of his opinion as to what constituted first degree murder, thereby placing impermissible legal theories before the jury.

The motion court correctly concluded that counsel's objection to the State's comments would have been overruled. It is clear from the page of the transcript that movant references

that, at most, the prosecutor gave an example of the types of crime that would carry a possible death sentence. Nowhere does the prosecutor say what he thinks first degree murder is. Moreover, White fails to allege facts establishing that he was prejudiced by the prosecutor's comment.

U.

White alleges that counsel "failed to take the necessary steps to preclude the jury, witnesses and the general public from being able to overhear each and every bench conference . . . [which] without question prejudiced" him. White does not, however, describe the substance of the bench conferences. The motion court correctly found that this allegation was insufficient because White fails to specify the allegedly prejudicial substance of the bench cónferences. The court did not err in denying a hearing on this issue.

V.

White alleges that "counsel failed and refused to reques that the court instruct the jury on the lesser included offenses of second degree murder and manslaughter when ch instructions were supported by the evidence." A court is required to instruct on lesser included offenses only if the evidence provides a basis for both an acquittal of the greater offense and a conviction of the lesser offense. *§556.046,* RSMo 1994; *State v. Mease,* 842 S.W.2d 98, 110-11 (Mo. banc 1992), *cert, denied,* 508 U.S. 918 (1993). White fails to point to any evidence that provides a basis for both an acquittal of first degree murder and a conviction of lesser offenses of second degree murder and manslaughter. Therefore, he has failed to allege facts showing that had counsel requested the instructions on these lesser included offenses, the instructions would have been given.

W.

White alleges that his counsel was ineffective for failing to object to the mitigating circumstances instruction given to jurors at the penalty phase of his trial because it was contrary to *Mills v. Maryland*, 486 U.S. 367 (1988), which held that jurors could not be confined to consideration of mitigating circumstances that the jury found unanimously. *Id.* at 375. In his motion and brief, White fails to specify which instruction violated *Mills* and how it was violated. This Court can find no such error. Because no mitigating circumstances were presented, the following modified version of MAI-CR3d 313.46 was given regarding the death penalty:

> You are not compelled to affix death as the punishment even if you have found existence of one or more aggravating circumstances. You must consider all the circumstances in deciding whether to assess and declare punishment of death. Whether that is to be your final decision rests with you.

This instruction clearly does not violate the mandate of *Mills*.

X.

White claims that the trial counsel was ineffective for "fail[ing] to object to all aspects of the State's penalty phase argument since at no time was the argument directed to those aspects of this crime or this Movant which would justify a sentence of death[.]" This allegation fails to specify how the State's penalty phase argument violates the "wide latitude" allowed in such arguments. *State v. Shurn*, 866 S.W.2d 447, 463 (Mo. banc 1993), *cert. denied*, __ U.S.___ ,115 S.Ct. 118 (1994). White fails to plead facts demonstrating that counsel's objection would have been meritorious.

Y.

White alleges that his trial counsel was ineffective "[w]hen counsel failed to request the court to instruct the jury that the testimony of a drug addict should be taken with care and caution." White fails to identify which witnesses he claims to be drug addicts in this paragraph of his motion. Moreover, White fails to cite any authority establishing that, if a witness were shown to be a drug addict, White would be entitled to such an instruction. Ordinarily, judges are forbidden from making comments on the evidence. Thus, White's allegation, even if true, would not warrant relief.

Z.

White claims that his counsel was ineffective for failing to object to the imposition of the death penalty in that Missouri's death penalty statute places unconstitutional discretion in the prosecutor. This Court has already rejected this constitutional claim. *See State v. McMillian*, 783 S.W.2d 82, 101-02 (Mo. banc 1990), *cert. denied*, 498 U.S. 881 (1990). The motion court did not err in finding that had trial counsel objected, the trial court would have properly overruled the objection."

AA.

White alleges that counsel provided ineffective assistance in failing to object to the State's opening statement wherein the prosecutor said that the evidence would show that White was involved in an ongoing and existing conspiracy.

The prosecutor's opening statement was not improper. White was charged with knowingly causing the death of Don Wright "by asphyxiating, cutting and stabbing him" and that such crime was committed by White "either acting alone or knowingly in concert with others . . ." One of the purposes of the opening statement is to inform the defendant of the

contemplated course of the prosecution to enable him to fairly meet the charges. *State v. Murray*, 744 S.W.2d 762, 774 (Mo. banc 1988), *cert. denied*, 488 U.S. 871 (1988). References during opening statement to arguably admissible evidence made in good faith with a reasonable expectation that the evidence will be produced are not grounds for reversal. *State v. Harris*, 870 S.W.2d 798, 809 (Mo. banc 1994), *cert. denied*, ___ U.S.___, 115 S.Ct. 371 (1994). Review of the trial transcript refutes White's contention that no evidence supported the prosecutor's statement that White conspired with others. Evidence was adduced from which it may be inferred that White and his two accomplices perpetrated a planned robbery and murder. Here, the prosecutor's opening statement was not improper because it placed before the jury and the defense the State's theory of the case. *See id.* Hence, this claim does not entitle White to any relief.

BB.

White alleges that counsel was ineffective in allowing the victim's mother and brother to remain in the courtroom, thereby allowing them to alter their expected favorable testimony. Neither witness was called to testify at trial. White does not state how the witnesses' expected testimony was changed. As the motion court correctly found, White fails to show how he was prejudiced by the presence of these witnesses in the courtroom.

CC.

Subject to certain exceptions, a motion court must issue findings of fact and conclusions of law on all issues presented. *Barry v. State*, 850 S.W.2d 348, 349-50 (Mo. banc 1993); *Rule 29.15(i)* (1988). White claims that the motion court did not address three of his claims.

Contrary to White's contention, the motion court did in fact enter findings and conclusions on White's allegations relating to failure to interview State's witnesses and failure to object to the judge's statements regarding the governor's authority to pardon. These claims are addressed above.

White also alleges that counsel was ineffective when "counsel, without movants [sic] consent or knowledge, agreed to allow the trial court to instruct the jury that in a previous case. another defense attorney had in fact lied and misled a previous jury."

The motion court apparently did not address this one allegation of ineffective assistance of counsel. While *Barry* concludes that Rule 29.15 requires findings of fact and conclusions of law on every issue, it also acknowledges that not every failure to enter a finding of fact or a conclusion of law requires reversal and remand. 850 S.W.2d at 350. There are some common sense exceptions. For example, no finding of fact is necessary where the only issue is one of law. *Id.* In addition, an appellate court will not order a useless remand to direct the motion court to enter a proper conclusion of law on an isolated issue overlooked by the motion court where it is clear that the movant is entitled to no relief as a matter of law and will suffer no prejudice by being denied a remand. *See State v. Stallings*, 812 S.W2d 772, 779 (Mo. App. 1991). In this particular case, White's claim is refuted by the record. The trial record reveals no oral or written instruction by the judge to the jury that in any earlier case, an attorney had lied to a jury. Thus, the pleadings and record conclusively show that relief was properly denied. Inasmuch as the motion court made extensive and specific findings and conclusions on every claim but one and the only claim upon which a necessary conclusion of law was omitted was a meritless allegation, reversal and remand are not warranted.

III.

In his appeal, White raises, for the first time, three claims not raised in his Rule 29.15 motions. All three fail.

A.

Judge Randall presided over White's first Rule 29.15 proceeding. In the first appeal, this Court remanded for a hearing to determine whether White had been abandoned by post-conviction counsel. Several days before the hearing, the judge had a conversation with the prosecuting attorney regarding the scope of the proceeding. White calls this conversation an improper ex parte communication, which gave rise to such an appearance of bias that the judge should have disqualified himself, sua sponte.

This argument is moot. The judge's determination that White had not been abandoned was overturned by this Court on White's second appeal. Attempting to revive this conversation as an issue, White notes that the judge's original rulings on the first amended Rule 29.15 motion are still before this Court. This is true, but that judgment was rendered on August 1, 1990, and the allegedly improper conversation occurred over one year later, in October or November of 1991. While we expect judges in this state to show foresight, it is a bit much to expect a judge to disqualify because of a conversation that is to occur more than one year in the future.

When the first motion judge made rulings relevant to the current appeal, no hint of bias existed. Therefore, he was under no duty to disqualify himself.

B.

Three weeks after the jury was discharged, the trial

judge held a hearing in chambers, where a juror testified that he thought he might have gone to high school with a man who sat in the courtroom during the trial. Apparently, this man was a family member of one of the victims. The juror testified that he had not associated the man with either side of the case and had not spoken with or acknowledged him during the trial.

Although White did not raise this issue in his direct appeal or assert it in his Rule 29.15 motion, he now asks this Court to conduct a plain error review. Plain error review may be considered "on appeal." *Rule 84.13 (c)*. This is not an appeal of White's conviction. Rather, this is an appeal of the post-conviction proceeding. Our standard of review here is whether the post-conviction court "clearly erred" in denying relief in the post-conviction proceeding. Since the issue was never raised in the post-conviction proceeding, error by that court, plain, clear or otherwise, is not discernible.

The only possible basis for considering the claim is under a claim of ineffective assistance of appellate counsel in the original appeal for failing to raise an issue which amounted to plain error. For purposes of discussion, we will assume that the issue is raised as a motion to recall the mandate.

In his brief, White asserts that if he had been present at the hearing, he "could have contributed to the outcome of the hearing, outlining for his attorneys the misconduct he had witnessed." However, the brief does not set forth that he actually observed any misconduct or that any misconduct actually occurred. White's absence from the hearing did not result in a manifest injustice or miscarriage of justice, and counsel's failure to raise such issue on appeal cannot be characterized as ineffective assistance of appellate counsel. This claim is denied.

C.

White finally contends that the time limits imposed by Rule 29.15 deprived him of his constitutional right to due process and resulted in arbitrary and capricious imposition of the death sentence, in violation of the constitutional prohibition against cruel and unusual punishment. White brings this claim for the first time on appeal, having failed to raise it in the motions for post-conviction relief as required by Rule 29.15 (d). This point is not reviewable. *See Twenter*, 818 S.W.2d at 641. Moreover, the time limits of Rule 29.15 are constitutional, even in death penalty cases. *See State v. Ervin*, 835 S.W.2d 905, 929 (Mo. banc 1992), *cert. denied*, 507 U.S. 954 (1993).

IV.

White's Rule 29.15 pleadings are fatally inadequate because he fails to allege facts, not conclusions, that, if true, would entitle him to relief or because his claims are refuted by the record. The reason for this holding is clear. The purpose of an evidentiary hearing is not to provide movant with an opportunity to produce facts not alleged in the motion. Rather, the purpose is to determine if the facts alleged in the motion are true. While the trial court erred in failing to enter a conclusion of law on one matter, remanding this case to supply the single missing legal conclusion would only serve to delay finality in this case and further burden the judicial system with a claim that is meritless.

The judgment of the trial court is affirmed.

JOHN C. HOLSTEIN, Chief Justice

Benton, Price, Limbaugh, Robertson, and Covington, JJ., concur; White, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
en banc

LEAMON WHITE,	)	**FILED**
	)	**FEB 25, 1997**
Appellant,	)	
	)	
vs.	)	**No. 78459**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Opinion Concurring in Part and Dissenting in Part

Today the majority places important new burdens on those who seek an evidentiary hearing to prove their claims of ineffective assistance of counsel. While I differ with the majority's interpretation of the law on the specific points outlined below, my fundamental disagreement is with the majority's approach. The majority appears to see an evidentiary hearing as an unusual event, one that is justified only in the most compelling circumstances. I cannot find justification in our rules or precedents for this approach, and I disagree with the implicit policy choice that underlies it. I see little harm m giving a defendant, especially a death penalty defendant, one chance to present evidence that his counsel was ineffective.

Our rules encourage evidentiary hearings. An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief.[1] In the name of judicial economy and finality, the majority holds that the fact that a Rule 29.15 cannot be endlessly mended

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[1]Rule 29.15(g) (1988).

means that it is a specially disfavored pleading. But nowhere does the role suggest that the motion is to be read more narrowly than any other pleading. In fact, the opposite is true. Except for the limited time in which they may be amended, post-conviction relief motions are to be treated exactly like all other civil filings.[2] If Rule 29.15 motions are to be judged by a different standard, the fact that they can only be amended in a limited way suggests to me that they should be read more, not less, broadly than other types of pleadings. I share the majority's interest in the finality, legitimacy, and efficiency of judicial proceedings. But these goals are ill-served by a pleading regime that elevates the form of pleadings over their substance. As this case shows, endless arguments about procedure are just as harmful to swift sure justice as substantive attacks.

When the substantive claims seem especially compelling, an approach based on form rather than substantive merit is especially troublesome. In this case, the entire defense was founded on a theory of misidentification. Allegations that trial counsel did not do all they could to pursue evidence of misidentification has great power to undermine confidence in the outcome of the trial. In Section II.E. of its opinion, the majority disposes of these claims on the barest technicality: the use of the words "failed to adduce testimony" in the pleadings. The majority does not hold that Mr. White has not identified his counsel's alleged error with sufficient particularity to allow a judge to try the question, which is the purpose of the pleadings. Rather, the focus is on phrasing. As the majority highlights, Mr. White's first mended motion was hurriedly and carelessly prepared. It is not the most polished pleading. The motion misplaces commas, misspells the names of parties and writes "eyewitness" as "eye witness." Yet the majority sees the motion as a sophisticated exercise in "clever gamesmanship." From the

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[2]Rule 29.15(a) (1988).

history of this case, it appears that Mr. White's appointed counsel was more concerned about meeting the short deadlines he was faced with when the original post-conviction counsel abandoned Mr. White than he was about using the "subtle wording" of his motion in an attempt to "sandbag the State."

The majority's comparison to a game is inapt. This is not a contest where prisoners are trying to trick the courts into giving them frivolous hearings and the courts attempt to come up with clever ways to ensure that few hearings are held. Mr. White did not seek to build his case upon the pleadings found deficient today; he offered a thorough and professional second amended motion. But because a judge mistakenly allowed that motion to be filed out of time, Mr. White was not allowed to present his strongest claims in their best light. Instead, he was forced to proceed on motions that the Court now finds were facially inadequate.

This narrow reading of the pleadings extends to the issue of prejudice. Credibility of the eyewitness testimony is at the heart of this case. But the majority is more concerned with pleading formality than whether there is evidence to support Mr. White's claim that eyewitnesses disagreed about who was present in the house. Even if the motion properly alleged that eyewitnesses would place another man at the scene, the majority holds, no sufficient allegation of prejudice would have been made because Mr. White does not also plead that he was not one of the other people present. If this allegation were true, I cannot see how Mr. White could not have been prejudiced. The witnesses the State built their entire case around would have been contradicted, by other eyewitnesses, about the identity of the assailants. The proper pleading of prejudice does not require one to foreclose every logically possible response to an allegation. The trying and weighing of the evidence are what the hearing is for. Mr. White has properly placed his counsel's performance on the issue of witness identification into question.

He should be given a hearing to see if he has any evidence to support his claim.

I would also remand to require findings and conclusions on all issues raised in the motion. This Court has properly limited appellate review of post-conviction relief motions to a determination of whether the factual findings and legal conclusions of the motion court are clearly erroneous.[3] Since the review is so limited, this Court has, in the past, required findings and conclusions on all issues mised in the motion.[4] But today, the majority abandons this rule and denies, sua sponte, a claim upon which the State admits no findings or conclusions were made. The majority justifies this by citing the "common sense exception" *Barry* described. That no findings of fact need to be entered when there are no factual disputes is axiomatic. Where, as here and in *Barry,* there has been no evidentiary hearing, the issues are exclusively legal ones. *Barry* reiterated the Court's long standing rule that, in a judgment on a motion for post-conviction relief, "'a mere recital or statement that the motion, files and records conclusively show that movant is entitled to no relief'" is insufficient.[5] Had the motion court issued the bare conclusion that the motion, files, and records had showed that Mr. White was entitled to no relief on this issue, *Barry* would clearly be violated. I cannot see. how the total silence of the motion court can provide a better platform for meaningful appellate review than the conclusory rulings *Barry* explicitly forbids.

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[3]Rule 29.15(j) (1988).

[4]Rule 29.15(i) (1988); *Barry v. State*, 850 S.W.2d 348 (Mo. banc 1993).

[5]*Barry*, 850 S.W.2d at 350 (quoting *Fields v. State*, 572 S.W.2d 477, 483 (Mo. banc 1978), which referred to the "nearly identical provisions" of the previous rule governing post-conviction relief, Rule 27.26).

In many cases, the motion court's rulings are worse than conclusory, they are clearly erroneous. Again, this is most clearly shown in relation to the motion court's ruling on the issue of possible testimony that another perpetrator committed the crime. On that issue, the motion court found:

> 4. Movant's claim in I(E) of his First Amended Motion that his counsel failed to adduce testimony from Ben Kinney that he and Don Wright sold drugs for two black men by the names of A.J. and Jose because they had threatened to kill Ben Kinney. Counsel is under no obligation to use impeachment material that he knows is improper. Allegations of crimes which have not resulted in criminal convictions are not proper impeachment. See State v. Stephens, 672 S.W.2d 714 (Mo. 1984); State v. Coats, 668 S.W.2d 119 (Mo. App. 1984). Also, this line of cross examination would also not be proper because it is not proper to cross examine so as to show other persons had motive for crime [sic] without evidence Connecting other person [sic] to crime [sic]. State v. Easley, 662 S.W.2d 248 (Mo. banc 1983); State v. Wynn, 666 S.W.2d 862 (Mo. App. 1984).
>
> 5. As to movant's claim in I(F) in his First Amended Motion that his counsel should have adduced that his counsel should have adduced testimony from Deonat [sic] and Raymond Kinney that A.J. was the second perpetrator and not movant, is not a claim with merit because there is no showing of any affirmative evidence that A.J. was connected with this crime as mandated in State v. Easley.

Apparently, the crucially deceptive effect of the phrase "failed to adduce" was quite lost on the motion court. The court also did not find that the alleged failure to discover contradictory eyewitness testimony resulted in no prejudice. Instead, the motion court denied a hearing on the clearly erroneous theory that eyewitness testimony placing a different man at the crime scene would not have been allowable because there was no evidence that that man was connected with the crime. The majority does not attempt to defend this circular argument and, instead, substitutes its own legal conclusions for those of the trial court. The rule in *Barry* is that meaningful appellate review of Rule 29.15 motions is crucially dependent on the entry of legal conclusions by the motion court, even when it has had no opportunity to determine factual issues. Where the legal conclusions of the trial court depart so substantially from the law, appellate review is similarly frustrated.

As Judge Thomas eloquently wrote for a unanimous Court the last time this case was before us: "[D]eath penalty cases, often involving heinous crimes, have become clouded by arguments regarding verification and the filing of paper work. Missouri courts need to see through this blizzard of paper and technicalities that fog the underlying issues so they can reach a just and timely result, especially in death penalty cases."[6] This case has bounced back and forth between the trial court and this Court in order to answer entirely peripheral questions such as whether a fingerprint is sufficient to verify a petition and what the proper remedy is to correct a judge's mistaken grant of a filing extension. In that time, Lemon White has spent eight years on death row not getting what he deserves. Whether Mr. White deserves a new trial or a speedy execution depends upon a question that has remained completely unexplored: was Mr. White sentenced to die because he tortured and killed Don

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[6]*State v. White*, 873 S.W.2d 590, 594 (Mo. Banc 1994).

Wright or because his lawyers were more concerned about protecting themselves than their client? The only way we can get the certain answer we must have before we execute Mr. White is to give him a hearing.

I concur fully in Section III of the majority opinion. My reading of Mr. White's motion, however, convinces me that he adequately presents allegations that call into question the competence and zeal of his trial counsel. With respect, I must dissent from the denial of an evidentiary hearing.

RONNIE L. WHITE, Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LEAMON WHITE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 97-**
	)	**1663-CV-W-3**
	)	
MICHAEL S. BOWERSOX,	)	
	)	
Respondent.	)	

ORDER GRANTING CERTIFICATE OF APPEALABILITY IN PART AND DENYING CERTIFICATE OF APPEALABILITY IN PART

On this date, the Court has denied Petitioner's Petition for Writ of Habeas Corpus. In order to appeal to the Court of Appeals, Petitioner must first obtain a Certificate of Appealability. 28 U.S.C. § 2253(c)(2) provides that a Certificate of Appealability should be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." "[A] substantial showing that a federal right has been denied . . . requires a showing that the issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." Fleiger v. Delo, 16 F.3d 878, 882-83 (8th Cir.), cert. denied, 513 U.S. 946 (1994).[32] The granting of a Certificate of Appealability is considered on an issue-by-issue basis. Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997).

As the Order denying Petitioners application demonstrates, the predominate issues in this case related to the

existence of, and Petitioners attempt to overcome, the procedural default of his claims in state court. The Court will (as specified below) deny a Certificate of Appealability with respect to the defaulted claims because there is no doubt that the claims were defaulted. Therefore, if the Court of Appeals reverses the rulings with respect to the procedural default, many of Petitioners defaulted claims would have to be reconsidered on remand.

After conducting an independent review of the matter, the Court concludes that a Certificate of Appealability should be granted with respect to the following issues, which will be identified by their heading from of the Order denying the writ:

II.A Procedural Default: Actual Innocence
II.B Procedural Default: Adequacy of State Grounds
III. Petitioners Entitlement to a Hearing
IV.F Ineffective Assistance of Appellate Counsel: Failure to Appeal Improper Removal of Juror for Cause
IV.L Trial Counsels Conflict of Interest
IV.O Due Process: Pleading Requirements
IV.AA Actual Innocence
IV.DD Judicial Bias During Postconviction Proceedings, Part I
IV.FF Judicial Bias During Postconviction Proceedings, Part II
IV.TT Conflict of Interest, Etc.

The Court concludes a Certificate of Appealability should be denied as to the remaining issues. When a Certificate of Appealability is denied, the court is required to "state the reasons why such a certificate should riot issue." Fed. R. App. P. 22(b); see also Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997). The rationale for the Courts ruling is as follows:

II.B Procedural Default: Ineffective Assistance of Postconviction Counsel, Part I - The Supreme Court and the Eighth Circuit have repeatedly held there is no right to effective assistance of postconviction counsel.

II.C Procedural Default: Abandonment of Postconviction Counsel - The Supreme Court and the Eighth Circuit have repeatedly held the Sixth Amendment does not apply in a postconviction proceeding.

IV.A Ineffective Assistance of Trial Counsel: Voir Dire, Part I - The claim has been procedurally defaulted.

IV.B Informing Jurors About the Governors Power to Pardon - The claim was implicitly rejected by the Supreme Court in Ramos and explicitly rejected by the Eighth Circuit in Bannister.

IV.C Ineffective Assistance of Trial Counsel: Failure to Raise *Caldwell* Objection - This claim was procedurally defaulted. In addition, the objection had no merit, so Petitioner could not have suffered prejudice.

IV. D Ineffective Assistance of Trial Counsel: Failure to Request Removal of Juror - This claim was procedurally defaulted.

IV.E Right to Fair and Impartial Jury - This claim was procedurally defaulted.

IV.G Ineffective Assistance of Trial Counsel: Failure to Object to Removal of Juror - This claim was procedurally defaulted. In addition, the record conclusively contradicts the factual basis for Petitioners claim.

IV.H Ineffective Assistance of Trial Counsel: Voir Dire, Part II - This claim was procedurally defaulted.

IV.I Ineffective Assistance of Trial Counsel: Failure to Investigate and Introduce Evidence of Innocence - This claim was procedurally defaulted.

IV.J Ineffective Assistance of Trial Counsel: Failure to Present Mitigating Evidence - This claim was procedurally defaulted.

IV.K Eighth Amendment Violation: Lack of Mitigating Evidence - This claim was procedurally defaulted. In addition, relief would require a new rule of Constitutional law in violation of Teague v. Lane.

IV.M Ineffectiveness of Appellate Counsel: Myriad of Claims - These claims all related to the failure to appeal specified claims of ineffective assistance of appellate counsel, which is not cognizable.

IV.N Due Process Violation: Abandonment by Postconviction Counsel - Case law firmly establishes that there is no right to counsel in a postconviction proceeding. Petitioners attempt to base his claim on the Fourteenth Amendment instead of the Sixth Amendment would require a new rule of Constitutional law in violation of Teague v. Lane.

IV.P Due Process: Rule 29.15ÿs Deadlines - The Eighth Circuit has already rejected this argument several times.

IV.Q Ineffective Assistance of Trial Counsel: Failure to Interview Joyce Williams - This claim was procedurally defaulted. In addition, Williams affidavit demonstrates that trial counsel did interview her.

IV.R Ineffective Assistance of Trial Counsel: Failure to Give an Opening Statement at the Beginning of Trial - This claim was

procedurally defaulted. In addition, the decision to deliver an opening statement at the beginning of the defendants case instead of the beginning of trial is a classic strategic decision that cannot be second-guessed.

IV.S Ineffective Assistance of Trial Counsel: Failure to Hire an Expert - This claim was procedurally defaulted.

IV.T Ineffective Assistance of Trial Counsel: Failure to Object to Instructions on Aggravating Circumstances - This claim was procedurally defaulted. In addition, Petitioner was not prejudiced because Missouri has a "nonweighing" capital sentencing scheme.

IV.U Ineffective Assistance of Trial Counsel: Failure to Object to Videotaped Lineup - This claim was procedurally defaulted. In addition, Petitioner was not prejudiced because the claim had no merit.

IV.V Ineffective Assistance of Trial Counsel: Failure to Impeach Detective Gibson - This claim was procedurally defaulted.

IV.W Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor Use of Peremptory Challenges and Certain Strikes for Cause - This claim was procedurally defaulted. In addition, Petitioners attempt to apply Batson v. Kentucky to the prosecutor use of peremptories to eliminate prospective jurors with marginal doubts about the death penalty is really a new rule that would be barred by Teague v. Lane.

IV.X Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor Closing Argument During Penalty Phase - This claim was procedurally defaulted.

IV.Y Ineffective Assistance of Appellate Counsel: Failure to Appeal Introduction of Evidence Regarding *Miranda* Waiver - Trial counsel did not make a constitutional objection, and Appellate Counsels decision not to appeal for plain error is hard to second-guess. In addition, the evidence does not constitute a comment on Petitioners decision not to testify at trial.

IV.Z Ineffective Assistance of Appellate Counsel: Failure to Appeal Ernest Blacks In-Court Identification of Petitioner - This claim would have been reviewed only for plain error. In addition, the factual basis for Petitioners claim is not supported by the record.

IV.BB Ineffective Assistance of Trial Counsel: Failure to Discuss Plea Offer - This claim was procedurally defaulted.

IV.CC Ineffective Assistance of Trial Counsel: Absence of Lead Trial Counsel - This claim was procedurally defaulted.

IV.EE Judicial Bias During Trial - This claim was procedurally defaulted.

IV.GG Ineffective Assistance of Trial Counsel: "Bad Loser" Comment - This claim was procedurally defaulted. In addition, as discussed in detail in the Order denying relief, the record demonstrates that Petitioner suffered no prejudice as a result of this comment.

IV.HH Ineffective Assistance of Postconviction Counsel, Part II - This claim is not cognizable.

IV.II Ineffective Assistance of Appellate Counsel: Failure to Raise Enumerated Claims - This claim actually consists of other claims raised independently elsewhere in the Petition. It is not an independent claim, and the issues it

raises are discussed elsewhere.

IV.SS Ineffective Assistance of Trial Counsel: Myriad of Claims - These claims were procedurally defaulted and, in any event, have no merit.

IV.UU Restriction on Cross Examination of Kinney - This claim involves issues of s law and is not cognizable in a habeas proceeding.

IV.VV Cumulative Error of Trial Counsel - The Eighth Circuit has repeatedly held this claim is not cognizable.

IV.WW Cumulative Error (Generally) - The Eighth Circuit has repeatedly held this claim is not cognizable.

IT IS SO ORDERED.

/s/_____
ORTRIE O. SMITH, JUDGE
DATE 12/4/98
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LEAMON WHITE,
Petitioner,
vs. **No. 97-1663-CV-W-ODS**
AL LUEBBERS,
Respondent.

VIDEOTAPED DEPOSITION OF DOROTHY B. MERRELL, a Witness, taken on behalf of the Petitioner before Glenda Moeller, CSR, RMR, CRR, pursuant to Notice on the 28th day of July, 2003, at the offices of Fox, Partee & Nigro, 606 West 39th Street, Kansas City, Missouri.

APPEARANCES

Appearing for the Petitioner were Mr. Charles W. Gordon, Jr. of Hubbell Peak O'Neal Napier & Leach, 30 West Pershing Road, Suite 350, Kansas City, Missouri 64108 and Mr. Ronald E. Partee of Fox, Partee & Nigro, 606 West 39th Street, Kansas City, Missouri 64111.

Appearing for the Respondent was Mr. Stephen D. Hawke, Assistant Attorney General, State of Missouri Attorney General's Office, Supreme Court Building, P.O. Box 899, Jefferson City, Missouri 65102.

Also present was Mr. Brent Christopher of Christopher Video.

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EXHIBITS REFERENCED:
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G. Merrell Deposition Exhibit 2 12
G. Merrell Deposition Exhibit 3 23
G. Merrell Deposition Exhibit 4 24

(Exhibits retained by Mr. Gordon.)

THE VIDEOGRAPHER: Today's date is July 28th, 2003. The time is 9:28 a.m. This is the deposition of Dorothy Merrell. Would you please swear the witness.

DOROTHY B. MERRELL,
a Witness, being first duly sworn, testified under oath as follows:

EXAMINATION BY MR. GORDON:

Q. Ms. Merrell would you tell us your full name, please?

A. Dorothy B. Merrell.

Q. And where do you live?

A. Atlanta, Georgia.

Q. How old are you?

A. Sixty-two.

Q. How long have you lived in Atlanta, Georgia?

A. Since '97.

Q. There was a time when you lived in Kansas City; is that right?

A. Correct.

Q. When was the last time that you lived in Kansas City?

A. Oh, my God. I left in - - no, no, no. Not in '97. I left Missouri right after this incident, I believe.
Q. So around 1987?

A. Something like that.

Q. Do you remember - - th incident you're talking about is the killing of Don Wright and the attack - -

A. Correct.

Q. - - on Carol and Ernest Black?

A. That's correct.

Q. And so you left town shortly after that?

A. Uh-huh.

Q. Today when you answer you need to give an out loud response - -

A. Oh, okay. Sorry.

Q. - - so they have it on the - -

A. Sorry about that.

Q. - - so she can write it down.

A. Okay.

Q. When you lived in Kansas City, where was it that you lived?

A. 45th and Brooklyn.

Q. And who lived in that house with you at 45th and Brooklyn?

A. Gwen, my two grandchildren, and Ben Kinney.

Q. Gwen is your daughter; is that right?

A. Yes.

Q. And we heard from her earlier this morning.

A. Yes.

Q. And Ben was her boyfriend; is that right?

A. Yes.

Q. And they lived together?

A. There in the house with me, yes.

Q. And your two grandchildren, what were their names?

A. Rodney and Jasmine. Rodney Louis and Jasmine Kinney.

Q. And they're pretty much grown up now; right?

A. Yes, correct.

Q. Did you know a lady named Carol Kinney at the time?

A. Nicki.

Q. She went by the - -

A. Yes.

Q. - - nickname Nicki?

A. Yes. Uh-huh, In didn't know her first name, but that's her, Nicki.

Q. And you knew her then as Nicki Kinney?

A. That's right.

Q. And Nicki Kinney, was she the sister of Ben Kinney?

A. Correct.

Q. And did she come around the house at 45th and Brooklyn?

A. Yes.

Q. Do you know a man named Don Wright?

A. Yes.

Q. And how did you know Don Wright?

A. Through Nicki. He was - - also showed up around my house.

Q. Did Don Wright have a relationship with Nicki at that time?

A. Yes.

Q. And did they live together somewhere?

A. As far as I know they did.

Q. Did they live very far from you at 55th and Brooklyn at that point?

A. About two blocks from me.

Q. Now, this house at 45th and Brooklyn, we understand that drugs were being sold out of that house at various times; is that right?

A. Yes.

Q. Can you tell me a little bit about that?

A. Well, I sold drugs when In was living there for Josh. I don't know his last name. I - -

Q. And who was Josh?

A. Another Jamaican.

Q. And how did that come about that you ended up having to sell drugs for Josh, that Jamaican?

A. Ben Kinney had messed up some drugs of his. And at the time Ben was dating my daughter Gwen. Josh was going to kill

them, kill my daughter. And in order for me to keep him from killing my daughter, he told me In had to sell drugs to keep my daughter alive. That's how In got started dealing with drugs. And when I wanted to get out, he would hold that over my head.

Q. So you felt pressured to sell the drugs?

A. Yes.

Q. And the drugs that you were selling, what kind of drugs were those?

A. Rocks. That's what we called them then, rocks. Cocaine rocks.

Q. And is another name for that crack cocaine? Rocks?

A. Rocks, that's all.

Q. How did people do the rocks? How did they use it?

A. Use it?

Q. Yes.

A. You could use it by smoking it on a can, but at the time they were using things called straight shooter and a pipe.

Q. Did people do drugs at the house, at your house, 45th and Brooklyn, when they would come over there and smoke crack?

A. Yes.

Q. And would people be coming in and out doing that?

A. Coming in and out to smoke, you mean?

Q. Yes.

A. They would come in and buy the drugs and stay in and smoke.

Q. When Ben was selling drugs at the house at 45th and Brooklyn, did he have different suppliers other than Josh?

A. Yes.

Q. Tell me a little bit about that.

A. Well, Ben dealt with different persons. He dealt with Jay and anybody that Jay would deal with. Jay usually - - at the time when I was with Josh, he was with Josh too. And after Jay left Josh, then I don't know did Ben get any more drugs from Jay or not. So, yeah, he was dealing with different connections.

Q. There was a man that you knew as Jay; is that right?

A. Yes.

Q. Did other people call him something else?

A. A.J.

Q. But when you talked to him, you called him Jay; is that right?

A. I used Jay because I was always scared of him. Jay was very dangerous.

Q. Why do you say that? Why do you say he was very dangerous?

A. Because when he would come to the house one time to buy

some drugs for Josh, and Ben was a big smoker, and Ben had used his drugs and he threatened to kill Ben if he didn't get them drugs up, or his money. So I had to get Ben the money to keep Jay from killing him.

Q. So you had seen Jay threaten Ben before?

A. Yes.

Q. And that made you - -

A. Because I was already into enough pressure with my daughter trying to keep Josh from killing her. Then I didn't want Jay to have to kill my granddaughter's dad, so I give him the money to keep him off of Ben.

Q. So you felt pressure from both Josh and from Jay?

A. Correct.

Q. And Jay was also known by A.J.?

A. Correct.

Q. I'm going to hand you a picture that we've marked in the previous depositions as G. Merrell Deposition Exhibit No. 1. Can you identify the person in that photograph?

A. Yes. Those eyes.

Q. Who is that?

A. Jay.

Q. Let me hand you another photograph. This has been marked G. Merrell Deposition Exhibit No. 2. Do you recognize that as

the same man?

A. Yes.

Q. And that is the man that you called Jay?

A. That's correct.

Q. And that's the man that other people called A.J.?

A. Correct.

Q. Do you know what his nationality was? Was he from around here? Was he American?

A. No.

Q. Was he foreign?

A. He's Jamaica.

Q. I want to ask you now about events that took place on January 5th and January 6th of 1987. You remember the morning of the attack where Don Wright was killed and Carol, Nicki, was injured and Ernest Black was injured?

A. Yes.

Q. And you understand - -

A. I know what happened, yes.

Q. And you understand that happened January 6th of 1987?

A. Yes.

Q. And those people, Don Wright, Carol Kinney and Ernest Black had been at your house before they were attacked; is that right?

A. Yes.

Q. Do you remember Don Wright and Carol Kinney that ev - - that morning and night before and talking with them and them being at the house?

A. Yes.

Q. Do you remember around what time they arrived at your house and what time they left your house?

A. Oh, the night that they was attacked?

Q. Yes.

A. They was practically there all day.

Q. Do you remember when they left the morning of January 6th?

A. They left early in the morning.

Q. Was it - - it was definitely after midnight on January 6th?

A. Oh, yes.

Q. Was it after 1 or 2 in the morning?

A. It was between maybe 2:30 something, 3 maybe, a little earlier, I don't remember. But it was early in the morning.

Q. And what were - - and I'll call her Nicki - - Micki because

you call her Micki, so I don't confuse you.

What were Micki and Don Wright doing that morning and the night before at your house at 45 th and Brooklyn?

A. Smoking.

Q. And what was it they were smoking?

A. Crack cocaine.

Q. And that's what you've called rock?

A. Yes.

Q. And how much smoking were they doing?

A. A lot.

Q. Do you remember Roger Buckner and A.J. - -

A. Yes.

Q. - - coming to the house that evening and that morning?

A. Yes.

Q. Tell me about that.

A. They came in there that morning. It was A.J. and Roger, he was wearing the Jheri-curl - -

Q. Let me ask you a little bit about Roger. I don't think I've asked you about him yet. You knew this guy named Roger Buckner; is that right?

A. Yes.

Q. And was he a friend of Ben Kinney?

A. Yes.

Q. And tell me about his hair. What kind of hair did he have?

A. He was wearing a long Jheri-curl. A Jheri-curl is what we call - - it was like a curl but we roll some kind of curl cream on it which make it real oily.

Q. So it's a pretty obvious different looking haircut?

A. Yes.

Q. And you knew Roger Buckner at that time to have this Jheri-curl haircut?

A. Yes.

Q. And he was at the house was it the morning of January 6th or the night before, the night of January 5th?

A. He was there before and the day that they was attacked.

Q. And what was he doing at the house?

A. When they first came there, they came to really kill us.

Q. When you say "they," was somebody with Roger?

A. When Roger came, he was with Jay.

Q. And Jay is the man you've identified in these photographs?

A. Yes. And they came really to kill us, because they known that we sold drugs. So Roger told Ben that he was there to kill us, but Ben didn't believe him at first because they grew up right close with one another in the neighborhood. So then they kept asking Ben did we have drugs, and Ben finally convinced them that we really didn't have drugs at the time, we were waiting on drugs. But I didn't have any drugs in the house. So that's why he didn't kill us. So Don and Nicki was there at the time that they was there.

Q. Now, Don and Nicki - - Don and Micki were there at the house when A.J. and Roger were at your house?

A. Correct.

Q. And this is the house at 45th and Brooklyn?

A. Correct.

Q. And did Don and Micki, did they know anything about Roger wanting to kill Bam and you and Gwen at the house?

A. Well, Ben told Micki that Roger would say - - Ben, he didn't really believe it, so he told his sister about Roger said that he come there to kill us if we had some drugs.

Q. Did he tell her that that night or was it - -

A. The same night. But then they didn't believe it. But I figured - - but he was with him. I never did like him, his eyes and his ways. I always was kind of scared of him.

Q. When Ben talked about Roger wanting to kill him and he didn't believe it, is that because they had a friendship that existed?

A. Who, Roger and Ben?

Q. Roger and Ben.

A. Yes.

Q. Did they go back a long ways?

A. Yes.

Q. What was Don Wright doing while A.J. and Roger Buckner was at the house?

A. Well, Ben and Roger and A.J. was talking, Nicki and Don was sitting at the table with me. So Don was bragging after he found out we didn't have any drugs and that Roger and Jay was wanting drugs. He always was a big bragger, Don was.

Q. Tell me about that. What do you mean - -

A. Don wanted to be we would call it a big shot, the man like Josh was. He wanted to be the mane that always had what everybody had and he didn't have. He was bragging about he had all kinds of drugs at his house.

Q. Did he say that so that Roger and A.J. could hear him?

A. Yes.

Q. Did he say - -

A. Because he wanted them to get - - he was the type that if I don't have, I got it, I'm big time, come to me, come to my house and you can get it. So he was saying that he had the drugs that they using, they could come out, pick up the drugs there. And so - -

Q. Did he really have drugs?

A. No. he never did have drugs. He always would agitate that th was big time sales drug. He was a big user, so he couldn't sell drugs. But he wanted to be - - like tell people that he would have drugs, I got drugs, come by here and get them.

Q. He kind of looked up to the drug dealers?

A. Yes.

Q. And he wanted to be a part of that culture?

A. Yes, but he didn't ever sell drugs.

Q. And was he a heavy user? How would you describe that?

A. He was a big smoker too, yeah.

Q. When Don was bragging in front of A.J. and Roger about having drugs, did Carol Kinney have any reaction? Micki, did she have a reaction?

A. Yes, she did.

Q. What was her reaction?

A. She told him that he was going to get them killed. Say you always lying and bragging about you have a lot of drugs and you know you don't have drugs. She said one day you're going to get us killed.

Q. So she was indicating she was concerned about his bragging?

A. She always did. At the time we was selling drugs, people

would kill you about anything about drugs. If you don't have them they'll kill you. Like Don, Don bragged that he had drugs, and if a person went there to get drugs and if you don't have them, they'll kill you, because that's what they were looking for, them drugs that you was supposed to have, and then you're lying to them. And especially when you shoot up like they were doing, they wanted them drugs and smoked that stuff, and them people will kill you because that what you say, you had the drugs. And Don never sold drugs.

Q. Did Don, that morning at your house, January 6th, that morning, make some arrangements with Roger to do a drug transaction, Roger and A.J.?

A. He told them that he had the drugs and they could come by and pick up the drugs.

Q. Who did he tell that to?

A. Jay was standing up there, and Roger, was talking to Roger.

Q. And did Don Wright make arrangements with Roger and Jay to have them come over to his house?

A. Yes, they was supposed to - - when they went home, they supposed to went up and picked the drugs - - got the drugs. But Nicki was kind of scared with him.

Q. Where were Jay and Roger supposed to go?

A. Up on - - they were about 45th and Prospect, up on Prospect.

Q. Is that the house that - - the house you're thinking of, is that the house where Don and Micki lived together?

A. Yes.

Q. So Don Wright had made an arrangement with Roger and Jay for them to come to his house?

A. Yes.

Q. And the idea was they were going to buy drugs from him?

A. Yes.

Q. And you said that Micki was scared about that.

A. Yes.

Q. How did she indicate that?

A. She always was on him about bragging about he had drugs. And with her two boys, she always was kind of scared that somebody was going to come in and kill them because of him bragging and he didn't have drugs.

Q. Did Don Wright and Micki leave the house at some point that morning?

A. Yes.

Q. Do you remember what time that was about?

A. About 20 minutes after Don had made arrangement for them to pick up the drugs, they left.

Q. Did Roger and Jay stay at your house longer?

A. Yes.

Q. And what were they doing when they stayed at the house longer?

A. They was sitting around there talking.

Q. What were they talking about, do you know?

A. They were mostly talking with Ben, talking drug talk.

Q. Talking drug talk?

A. Yes.

Q. And how much longer did Jay and Roger stay at the house?

A. They stayed there abut 5 to 10 minutes.

Q. And then they left the house?

A. Right after Don and Nick left, about 5 or 10 minutes later Roger looked at Jay and said, "Let's go get the drugs."

Q. And the man with Roger that night, there's no doubt in your mind, was the man shown in G. Merrell Deposition Exhibit No. 1?

A. Correct.

Q. And that's Jay?

A. Yes.

Q. I want to show you now what's been marked as G. Merrell Deposition Exhibit No. 3. That man is Leamon White. Had you even seen Leamon White at your house?

A. No.

Q. Other than in this photograph and the photograph we've marked as G. Merrell Deposition Exhibit No. 4, had you ever seen Leamon White?

A. No, I never heard of him or his name until I seen that guy came to Atlanta.

Q. And the guy that came to Atlanta you're talking about his Dan Grothaus; is that right?

A. Yes.

Q. And he's the one that took that affidavit from you several years ago; is that correct?

A. Correct.

(D. Merrell Deposition Exhibit 1 was marked for identification.)

Q. (By Mr. Gordon) I'm going to hand you what's been marked D. Merrell Deposition Exhibit No. 1. Do you recognize that as the affidavit you have to Don Grothaus?

A. Yes.

Q. And your signature is on page 2; is that right?

A. Correct.

Q. And then there was some photographs that were attached that you signed to the affidavit. Do you see that?

A. Yes.

Q. And that's your signature under the photograph that says Exhibit A?

A. Yes.

Q. And that is a photocopy of this photograph of A.J. that you've identified as G. Merrell Deposition Exhibit No. 2?

A. Yes.

Q. And then there was a photograph that was marked as Exhibit B, the last page of that affidavit. Do you see that?

A. Yes.

Q. And that is a photocopy of the photograph that you've identified as G. Merrell Deposition Exhibit No. 4.

A. Uh-huh, yes.

Q. And Leamon White was never over at your house on 45th and Brooklyn?

A. As long as I was at 45th and Prospect - - Brooklyn, when I was dealing drugs, I never did see this Leamon White. I never heard of him. As far as I know, he never been in my house. And I always kind of - - I had to fix it so I would know who would come in and out there.

Q. So you knew the people coming in and out of your house?

A. Very much so.

Q. And you're positive, as you sit here today, that Leamon White was never in your house?

A. He was never at my house. Never. No time before then, that night.

Q. And you're positive as you sit here today that Jay was at your house?

A. Yes.

Q. And that Jay was at your house with Roger Buckner?

A. Yes.

Q. And Jay was at your house with Roger Buckner on the morning of January 6th, 1987?

A. Yes.

MR. GORDON: Thank you, Ms. Merrell, those are my questions.

EXAMINATION BY MR. HAWKE:

Q. Just a few questions from me this morning. On January 6th of 1987, who was in your house?

A. You mean how many all of us that was in there?

Q. Yes. Identify those people for us.

A. Don, Nicki- -you mean you want me to include A.J. and - -

Q. Yes, ma'am.

A. Jay, Roger, Ben Kinney, Gwen. That's as far as I can remember who was there.

Q. And I believe I heard you say that Don was not a seller of drugs?

A. As far as I know, he never sold drugs.

Q. And what do you mean when you say he is not a seller? He did not have a house, a crack house?

A. No, he did not have one.

Q. Okay. And to your knowledge, he was not a seller of drugs?

A. Correct.

MR. HAWKE: Okay, that's all.

MR. GORDON: All right, Ron, do you have anything?

MR. PARTEE: No.

MR. GORDON: Okay, we're finished.

THE VIDEOGRAPHER: We're going off the record at 9:50 a.m.

Supreme Court, U.S.
4 FILED

05-686 NOV 21 2005

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center
Petitioner,

v.

LEAMON WHITE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION
VOL. 3 OF 3

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TESTIMONY OF DEONTA KINNEY AT TRIAL OF ROGER BUCKNER

MR. BERRIGAN: The defense will call Deonte Kinney to the stand, Your Honor.

DEONTE KINNEY, called as a witness on behalf of the Defendant, being first duly sworn by the Court, testified:

DIRECT EXAMINATION BY MR. BERRIGAN:

Q. Would you state your name please, Deonte?

A. What do you mean?

Q. Tell me your name.

A. Deonte Kinney.

Q. How old are you, Deonte?

A. Eleven.

Q. Do you go to school?

A. Yes.

Q. What grade are you in?

A. 5th.

Q. Can you read and write?

A. Yes.

Q. All right. Do you understand the difference between telling

the truth and telling a lie, Deonte?

A. Yes.

Q. You have done this before. You have testified under oath, told us what happened about this case, haven't you?

A. Yes.

Q. Do you remember back in March when - - actually it wasn't March, September, when you came up to the tenth floor of this building and you talked to Mr. Hall and Barbara and I about the case?

A. Yes.

Q. All right. Now you are in court today and I'm going to ask you some questions about what took place the evening that your mom got stabbed in the neck, okay. First of all, do you remember what you did that day, that is the day before your mom got stabbed?

A. No.

Q. Do you remember if you went to school or not?

A. I went to school.

Q. Okay. What did you do after school?

A. Went back home that day. But not the day my mom got stabbed.

Q. I'm just going to talk about the day that your mom got stabbed. What did you do after school that day?

A. Went over to my uncle's.

Q What's his name?

A. Bam.

Q. Bam. Does he have a real name?

A. Yes.

Q. What is it?

A. Benjamin.

Q. What's his last name?

A. Kinney.

Q. Where did he live back then?

A. Somewhere over there on Olive.

Q. Was that on 44th Street near Olive?

A. Yes.

Q. Is it near a park?

A. Yes.

Q. How did you get over to Uncle Bam's house from school?

A. Walked.

Q. Did you go right after school?

A. Yes.

Q. What time do you get out of school.

A. 3:30.

Q. And why were you going over to Uncle Bam's?

A. Because my mom had to go to work and there wasn't nobody home.

Q. Did you used to go to Uncle Bam's a lot back then?

A. No.

Q. So this was a special time?

A. Right.

Q. Who went over to Uncle Bam's with you?

A. My brother.

Q. Okay. And do you know when you got over to Uncle Bam's, who was there?

A. Yes.

Q. Who was there?

A. Bam and two other guys.

Q. Who were these two other guys?

A. I don't know their name.

Q. What were they doing at Bam's?

A. Playing cards.

Q. Was there anybody else there at Bam's?

A. No.

Q. Do you know Bam's girlfriend?

A. Yes.

Q. What's her name?

A. Gwen.

Q. Was she over there?

A. No.

Q. What about Gwen's mom, do you know her?

A. Yes.

Q. Dorothy?

A. Yes.

Q. Do you remember seeing her there?

A. No.

Q. The only people you remember were Bam and these two friends of his playing cards, huh?

A. Yes.

Q. What did you do after you got to Bam's house?

A. Me and my brother and Bam's son went up to the park.

Q. What is Bam's son's name?

A. Rodney.

Q. Rodney. All right. And when you and Rodney and your brother went to the park to play, did you come back to Bam's house?

A. Yes.

Q. Do you know what time it was when you came back?

A. No.

Q. Was it still dark or was it - - I mean was it dark or was it still light?

A. Still light.

Q. When you came back to Bam's house now, after being in the park, what did you do?

A. Went in and got a drink of water.

Q. Did you see these other men still there?

A. Yes.

Q. What were they doing now?

A. Arguing over who's winning or not.

Q. Who's winning what?

A. Cards.

Q. Cards. Was there anybody else there other than Bam and the two men?

A. No.

Q. Now, after you got this drink of water, what did you do?

A. Went back up to the park.

Q. Okay. You played some more?

A. Yes.

Q. All right. Did you come back to Uncle Bam's house then?

A. Yes.

Q. And now when you came back to Uncle Bam's this second time, was it light or dark outside?

A. Sort of dark.

Q. The sun was going down?

A. Yes.

Q. Now, what did you do when you came back to Uncle Bam's the second time when the sun was going down?

A. Went in and stayed in.

Q. I'm sorry?

A. Went in and didn't come back out.

Q. You stayed in Uncle Bam's for quite awhile after that?

A. Right.

Q. What did you do at Uncle Bam's house?

A. Had a sandwich and I sat down and watched TV.

Q. Did you see any other people there this time, Deonte?

A. Gwen came back over.

Q. All right. Anybody else?

A. No.

Q. Was your mom there then?

A. No.

Q. When did she get there, or did your mom ever come over to Bam's?

A. No, she didn't ever come back over.

Q. You don't remember her coming over?

A. No.

Q. Was there anybody else with Bam other than these two men that you have told me about?

A. No.